On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in section 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of section 41B (1) (c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

The answer to the first question must accordingly be clearly in the negative and we so decided at the conclusion of argument in this reference.

Order accordingly

Solicitors: *Kumar & Co.*

MARK KODING v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J., Hashim Yeop A. Sani J. & Abdoolcader J.) March 30 & April 17, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 3 of 1982]

Constitutional Law – Right of free speech in Parliament – Whether limited by amendment to Constitution by Constitution (Amendment) Act, 1971 – Whether amendment valid – Basic structure of Constitution – Fundamental rule of natural justice – Questioning matter established or protected by provisions of Article 152 of Constitution – Sedition Act, 1948, s. 4(1)(f) – Houses of Parliament (Privileges and Powers) Ordinance, 1952, ss. 3, 8 & 33 – Federal Constitution, arts. 10, 63, 152 & 162.

Criminal Law and Procedure – Sedition – Reference of question to Federal Court – Effect of Constitution – Rules of the Federal Court, rr. 33, 34 & 35 – Courts of Judicature Act, 1964, ss. 48 & 49.

Interpretation – Interpretation of written Constitution – Maxim generalia specialibus non derogant – Whether applicable.

In this case the accused a Member of the House of Representatives made a speech in Parliament which was thought to be seditious and he was charged with committing an offence contrary to section 4(1)(b) of the Sedition Act. At the end of the prosecution case, the learned trial judge called on the accused to enter on his defence. Counsel for the accused announced that the defence did not wish to call any witness. The learned trial judge then referred three questions to the Federal Court as follows:

"(1) As a Member of Parliament, has the Accused's right of free speech in Parliament given (a) by sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance [No. 15 of] 1952 and (b) by Article 63(2) of the 1957 Federal Constitution been validly limited by the subsequent constitutional amendment with the addition of Clause (4) to Article 63 by Act A30?

(2) As a Member of Parliament, is the Accused's right of free speech in Parliament given by Article 63(2) of the Constitution either (a) part of the basic structure of the Constitution or (b) a fundamental rule of natural justice, so that any purported amendment of the Constitution seeking to limit such right is void and of no effect?

(3) Having regard to the position of Malay language as the national language under Article 152 Clause (1) of the Federal Constitution and questioning it would bring into operation section 3(1)(f) of the Sedition Act 1948 (Revised 1969) – can the demand for closure of Chinese and Tamil schools in the process of implementing the national language be legally and constitutionally treated as questioning the provision of proviso (a) of Article 152(1), notwithstanding that there is no demand for the abolition or prohibition of the teaching or learning of such languages?"

Held: (1) the accused's right of free speech in Parliament given by sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance, 1952, and by Article 63(2) of the Federal Constitution, has been validly limited by the amendment effected by the new Clause (4) of Article 63 added by the Constitution (Amendment) Act, 1971;

(2) it is unnecessary to decide whether or not the Constitution may be so amended as to destroy its basic structure and, in any event, the accused's right of free speech in Parliament given by Article 63(2) of the Constitution does not form part of the basic structure of the Constitution;

(3) the said right is not part of the fundamental rule of natural justice;

(4) thus the amendments made by the Constitution (Amendment) Act, 1971 limiting an M.P.'s right of free speech in Parliament are valid;

(5) the answer to the third question is bound up with the facts of the case which were uncertain and as to which there were no findings by the learned trial judge, and it would be premature and speculative to answer this question at this stage;

(6) the matter should be remitted to the learned trial judge for continuation and disposal in accordance with this judgment.

[Semble: It would have been better if the learned Judge had not referred the matter to the Federal Court but instead had himself decided the constitutional questions which arose (which he had jurisdiction to do) and decided the case one way or the other]

Cases referred to:

(1) *Endell Thomas* v. *Attorney-General of Trinidad and Tobago* [1981] 3 W.L.R. 601.

(2) *Fernandez* v. *Attorney-General* [1970] 1 M.L.J. 262, 264.

[The following authorities were also cited in argument: *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 M.L.J. 187; *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64; *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49; [1981] 3 W.L.R. 395, 399-400; *Phang Chin Hock* v. *Public Prosecutor* [1980] 1 M.L.J. 70; *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50; *Yeap Hock Seng* v. *Minister for Home Affairs, Malaysia & Ors.* [1975] 2 M.L.J. 279]

FEDERAL COURT.

Mervyn Heald Q.C. (*Marina Yusof* and *Wong Chee Min* with him) for the applicant.

Lamin bin Haji Mohamed Yunus, (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): The accused, a lawyer, was a member of the Dewan Rakyat, i.e., the House of Representatives, elected for a constituency in Sabah; and on October 11, 1978, he made in the House a speech which the Public Prosecutor thought was seditious, and accordingly he was charged with committing

an offence contrary to section 4(1)(b) of the Sedition Act 1948 (Revised 1969).

The charge reads as follows:

"That you on October 11, 1978, in the Dewan Rakyat, in the City of Kuala Lumpur, Federal Territory, in the course of your speech before the said Dewan did utter seditious words to wit, as per attached Appendix 'A', and thereby committed an offence punishable under section 4(1)(b) of the Sedition Act 1948 (Revised 1969)".

After the end of the prosecution case in the High Court defence counsel submitted no case to answer, but the learned trial Judge held that there was, and called on the accused to enter on his defence; whereupon his counsel announced that the defence did not wish to call any witness.

The judge could have decided the matter then; but on application by the defence, he referred the matter to this court under sections 48 and 49 of the Courts of Judicature Act 7 of 1964 (Revised 1972), Act 91, which provide:

"48. (1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the Judge hearing such proceedings may stay the same on such terms as may be just to await the decision of such question by the Federal Court.
(2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
(3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
(4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

49. (1) Where a special case has been transmitted to the Federal Court under section 48 the Federal Court shall, subject to any rules of court of the Federal Court, deal with the case and hear and determine it in the same way as an appeal to the Federal Court.
(2) When the Federal Court shall have determined any special case under this section the High Court in which the proceedings in the course of which the case has been stated are pending shall continue and dispose of such proceedings in accordance with the judgment of the Federal Court and otherwise according to law."

The relevant rules are Federal Court Rules 33, 34 and 35, published as P.U.(A) 33 on February 7, 1980. These three rules read:

"33. (1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the Judge hearing such proceedings may make an order on such terms as may be just staying such proceedings to await the decision of such question by the Federal Court.
(2) An order staying proceedings under this Rule may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may consider most suitable having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final disposal of the proceedings.
34. (1) Where an order for stay of proceedings has been made under Rule 33 the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case for the opinion of the Federal Court.
(2) Wherever possible the question which has arisen shall be stated in a form which shall permit of an answer being given in the affirmative or the negative.
(3) Every special case stated under this Rule shall be divided into paragraphs and shall concisely state such facts and shall include such documents as may be necessary to enable the court to decide the question raised thereby and shall be signed by the Judge.
35. (1) A special case stated under Rule 34 shall be delivered to the plaintiff.
(3) In relation to a criminal proceeding the Attorney-General shall be deemed to be the plaintiff and the accused person shall be deemed to be a party other than the plaintiff."

The questions referred to us are three as follows:

"(1) As a Member of Parliament, has the Accused's right of free speech in Parliament given (a) by sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance [No. 15 of] 1952 and (b) by Article 63(2) of the 1957 Federal Constitution been validly limited by the subsequent constitutional amendment with the addition of Clause (4) to Article 63 by Act A30?
(2) As a Member of Parliament, is the Accused's right of free speech in Parliament given by Article 63(2) of the Constitution either (a) part of the basic structure of the Constitution or (b) a fundamental rule of natural justice, so that any purported amendment of the Constitution seeking to limit such right is void and of no effect?
(3) Having regard to the position of Malay language as the national language under Article 152 Clause (1) of the Federal Constitution and questioning it would bring into operation section 3(1)(f) of the Sedition Act 1948 (Revised 1969) – can the demand for closure of Chinese and Tamil schools in the process of implementing the national language be legally and constitutionally treated as questioning the provision of proviso (a) of Article 152(1), notwithstanding that there is no demand for the abolition or prohibition of the teaching or learning of such languages?"

On March 30 we decided as follows:

Question 3.

We decided that it was premature and speculative to answer this question at this stage and advised counsel to address the submission he had prepared on it to the trial Judge to whom we remitted the case. We are of the opinion that the answer to this question is bound up with the facts of the case which were uncertain, as to which there were no findings as yet by the learned Judge; and so if we had proceeded we would have had to proceed on the basis of assumptions only. In particular Appendix A to the charge containing the speech about which complaint was made is a long one and whether or not it was seditious within the Act will depend on a reading of particular parts in it, on a reading of it as a whole and on consideration of the context in which it was made.

Question 1.

We ruled that the accused's right of free speech in Parliament given:

(a) by sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance, 1952, and
(b) by Article 63(2) of the Federal Constitution,

has been validly limited by the amendment effected by the new Clause (4) of Article 63 added by the Constitution (Amendment) Act, 1971 ("Act A30").

Question 2.

(a) We did not consider it necessary to decide the question whether or not the constitution may be so amended as to destroy its basic structure; and in any event, we did not consider that the accused's right of free speech in Parliament given by Article 63(2) of the Constitution forms part of the basic structure of the Constitution.
(b) Secondly, we ruled that the said right is not part of the

fundamental rule of natural justice.

Thus, in our judgment, the amendments in question limiting ar M.P.'s right of free speech in Parliament are valid.

We now give our reasons.

The amendments impugned here are those made by the Emergency (Essential Powers) Ordinance No. 45, 1970, published as P.U.(A) 282/70 ("Ordinance 45") and by Act A30.

But to understand this better it is desirable that we start at the beginning.

Before Merdeka the Houses of Parliament (Privileges and Powers) Ordinance, 1952, governed the privilege of free speech in the Legislature. Its three sections, viz, sections 3, 8 and 33(1) provided as follows:

"3. There shall be freedom of speech and debate or proceedings in the Legislative Council and such freedom of speech and debate or proceedings shall not be liable to be impeached or questioned in any court or tribunal out of the Legislative Council."

"8. No member shall be liable to any civil or criminal proceedings, arrest, imprisonment, or damages by reason of any matter or thing which he may have brought by petition, bill, resolution, motion, or otherwise, or have said before the Legislative Council or any committee."

"33. (1) Save as is otherwise expressly provided by this Ordinance, the Legislative Council and the members thereof respectively shall hold, enjoy and exercise such and the like privileges and immunities, and powers relating thereto as are held, enjoyed and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof and also such privileges, immunities and powers as are from time to time defined by any law of the Federation but not exceeding those at the commencement of such law held, enjoyed and exercised by the Commons House aforesaid and by the numbers thereof respectively whether such privileges, immunities or powers were so held, possessed or enjoyed by custom, statute or otherwise."

Afte Merdeka, for "Legislative Council" in the above two provisions read "House", i.e. either House of Parliament.

Article 162(1) of the 1957 Constitution provides that the Ordinance, being law existing at the time of the coming into force of the Constitution (August 31, 1957), shall continue to be in force after Merdeka Day with such modifications as may be made therein under the Article and subject to any amendments made by federal law. (No such modifications or amendments have been made).

The privilege of free speech given to members of the legislature by the 1952 Ordinance was repeated by the 1957 Constitution in Article 63(2) which provides:

"63. (2) No person shall be liable to any proceedings in any court in respect of anything said or any vote given by him when taking part in any proceedings of either House of Parliament or any committee thereof."

Fre lom of speech is also dealt with in Article 10 of which the relevant provisions read:

"(1) Subject to Clauses (2) and (3)
(a) every citizen has the right to freedom of speech and expression;
(2) Parliament may by law impose –
(a) on the rights conferred by paragraph (a) of Clause (1), ... restrictions designed to protect the privileges of Parliament . . . "

It is now necessary to say something about what happened on May 13, 1969, and subsequent events.

Parliament was dissolved on March 20, 1969, and a general election was held to the House of Representatives and to all State Legislatures beginning on Saturday 10th of the following May. During 51 days of vigorous campaigning many hurtful things were said on issues about which different races felt very strongly by politicians determined to win seats and also by their supporters and detractors, with the result that racial feelings were inflamed culminating in inter-racial rioting beginning on Tuesday, May 13, in Kuala Lumpur.

Two days after the outbreak of violence His Majesty proclaimed a state of emergency under Article 150.

At the same time, acting under Clause (2) of that Article he promulgated the Emergency (Essential Powers) Ordinance, 1969, Ordinance 1, published as P.U. (A) 146/1969, giving himself wide powers for securing public safety, the defence of Malaysia and the maintenance of public order.

On August 10, 1970, His Majesty amended among other things the Sedition Act, 1948; he did this by Ordinance 45 already referred to. It was argued that this amendment was invalid.

To understand the controversy regarding the amendments by Ordinance 45 it is necessary to go back to the Sedition Act, 1948 (Revised 1969).

Section 4(1)(b) of that Act provides that any person who:

"utters any seditious words shall be guilty of an offence . . . "

Section 2 thereof defines seditious words as words: "having a seditious tendency."

A seditious tendency is a tendency of the kind mentioned in paragraphs (a) to (e) of subsection (1) of section 3 of the Act. What Ordinance 45 did was to add a new paragraph (f), so that thereafter it will also be seditious to:

"question any matter or right, status, position, privilege . . . established or protected by the provisions of . . . Article 152 [of the Constitution] . . . "

The intention and effect is to make it seditious to question among other things the status of bahasa Malaysia as the national and official language and any other language, right and privilege guaranteed by Article 152, including the right to use (except for official purposes), teach and learn *inter alia* Chinese and Tamil.

But at the same time Ordinance 45 also amended section 3(2) of the Sedition Act, the effect of which is to allow a person to question the *implementation* of Article 152, as opposed to questioning the *existence* of the rights guaranteed by it.

We can take judicial notice of the fact that language is a sensitive issue about which feelings can be and were sometimes whipped up by politicians wishing to be voted into the legislature and power.

That the law maker is determined to curb this is shown by another amendment made by Ordinance 45 and that is the amendment to the Election Offences Act, 1954. A new subsection (2) of section 3 of that Act provides that any person convicted by virtue of the new paragraph (f) of subsection (1) of section 3 of the Sedition Act:

"shall, until the expiration of five years from such conviction, be incapable of being elected at any election, and if at that date of such

conviction he has been elected at any election, his seat shall be vacated from that date."

As was said by Mr. Heald for the accused before us, this is severe punishment indeed for any one in politics.

To revert to May 13, by the middle of 1970 Government felt that the security situation had improved sufficiently to justify the resumption of parliamentary democracy and in due course the uncompleted elections to the House of Representatives and state legislatures were completed; and eventually on February 20, 1971, Parliament was reconvened.

Early in 1971 Parliament enacted the Constitution (Amendment) Act, 1971, Act A30, which came into force on March 10 that year.

That Parliament too was determined to curb exploitation of sensitive issues and thus reduce the risk of further racial disturbances was shown by:

(a) the amendment made to Article 10 of the Constitution by the addition of a new clause (4) enabling Parliament to

"pass law prohibiting the questioning of any matter, right, status, position, privilege . . . established or protected by the provisions of . . . Article 152 . . . otherwise than in relation to the implementation thereof as may be specified in such law" [no such law has been made]; and

(b) by the amendment made to Article 63 dealing with the privileges of Parliament by the addition of a new Clause (4). This new Clause provides that

"Clause (2) [of Article 63 providing for immunity for a member of Parliament for anything said by him in the House] shall not apply to any person charged with any offence under the law passed by Parliament under Clause (4) of Article 10 or *with an offence under the Sedition Act, 1948, as amended by the Emergency (Essential Powers) Ordinance No. 45, 1970*".

Whatever may have been the legal status of Ordinance 45, it has now received the stamp of constitutional approval no less, and accordingly in our judgment it is perfectly valid. This is so even if, as Mr. Heald suggested, the emergency proclaimed in May 1969 had lapsed by effluxion of time, which in our view is not possible. It will cease to be in operation only if revoked by His Majesty or if both House of Parliament resolved to annul the Proclamation; without such a positive act, it remains in force (Article 150(3)).

It is true that when Ordinance 45 and subsequently the Constitution was amended by Act A30, sections 3, 8 and 33(1) of the Houses of Parliament (Privileges and Powers) Ordinance, 1952, were left untouched; but in our judgment, by virtue of Clause (6) of Article 162 this court interpreting that Ordinance, being "existing law" within that Article, must interpret it "with such modifications as may be necessary to bring it into accord with the provisions of [the] Constitution", which Article 4 says is "the supreme law of the Federation". Doing so, we must read that Ordinance as having been amended by Act A30.

It is true that Clause (1) of Article 10 gives the citizen freedom of speech and expression, and that under Clause (2)(a) Parliament may by law impose restrictions, *inter alia*, "designed to protect" – not reduce – "the privileges of Parliament"; but this Clause must clearly refer to restrictions not on or against Parliament, but against others for the protection of the privileges of Parliament and its members and for its and their benefit and advantage. Any restrictions imposed which adversely affect the privileges of Parliament must, subject of course to the express provisions of Article 63, *ex necessitate rei*, come within any of the other matters specified in the earlier part of Clause (2)(a) for which restrictions may be imposed; and this is made absolutely clear by the provisions of the new Clause (4) inserted in Article 10.

More significantly, the new Clause (4) of Article 63, which, as already stated, has given the stamp of constitutional approval to the new paragraph (f) of subsection (1) of section 3 of the Sedition Act, first enacted by Ordinance 45, makes a specific exception to the provisions of Article 63(2) and the maxim *generalia specialibus non derogant* applies – a maxim applicable to the interpretation of written constitutions, as Lord Diplock said at page 618 when delivering the judgment of the Privy Council in *Endell Thomas* v. *Attorney-General of Trinidad and Tobago*[1].

For the foregoing reasons we are of the view that the amendment to the Sedition Act and to Article 63 of the Constitution have validly limited freedom of speech in Parliament.

As regards the argument that the amendments complained of affected the basic structure of the constitution and are therefore unconstitutional, with great respect to Mr. Heald, we have no difficulty in holding that they do not; and it was therefore unnecessary for us to consider the question whether or not Parliament has power to so amend the constitution as to alter its basic structure whatever that may be.

Equally we have no difficulty in holding that the impugned amendments have no bearing on the rules of natural justice.

This matter is accordingly remitted to the learned trial Judge for continuation and disposal in accordance with this judgment and otherwise according to law.

Before departing from this case, we would make two observations. First, Malaysians take pride in the fact that our country is a parliamentary democracy and we have since independence held free general elections every five years as enjoined in the Constitution. Malaysians with short memories and people living in mature and homogeneous democracies may wonder why in a democracy discussion of any issue and in Parliament of all places, should be suppressed. Surely it might be said that it is better that grievances and problems about language, etc. should be openly debated, rather than that they be swept under the carpet and allowed to fester. But Malaysians who remember what happened during May 13, 1969, and subsequent days are sadly aware that racial feelings are only too easily stirred up by constant harping on sensitive issues like language; and it is to minimize racial explosions that the amendments were made.

Secondly, we would observe that it would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez* v. *Attorney-General*[2]) and decided the case one way or the other. If he had done that and there were an appeal to us, the whole matter would have been disposed of in two steps.

By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of section 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.

Order accordingly.

Solicitors: *Marina Yusof & Co.*

SITI AISHA BINTI IBRAHIM v. GOH CHENG HWAI

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. and Abdoolcader J.) April 14 & May 5, 1982]
[Penang – Federal Court Civil Appeal No. 91 of 1981]

Practice & Procedure – Appeal – Finding of fact by trial court – Whether appeal court justified in interfering with finding.
Practice & Procedure – Pleadings – Failure of plaintiff to abide by pleadings – Whether fatal.

In this case in an action for damages the President Sessions Court Penang found that the respondent the driver of a car was negligent and that the appellant was guilty of contributory negligence. The evidence revealed that the respondent had seen the appellant an old lady some thirty feet away about to cross the road. The learned President found in effect that the respondent was negligent in failing to take precautions and that the appellant herself was not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. He apportioned the liability at 50-50. On appeal, Arulanandom J. allowed the appeal and ordered that the appellant's claim be dismissed with costs. The appellant appealed. In her pleadings the appellant alleged that she was "lawfully walking along the proper side of the road" whereas in her evidence she said she was walking across the road.

It was argued *inter alia* on appeal that the failure to abide by her pleadings was fatal and the appellant's claim should therefore be dismissed.

Held: (1) it is clear that the defendant/respondent was not misled, prejudiced or embarrassed or in any way taken by surprise or led astray by the plaintiff's pleading because from the very outset it was the contention and the case for the defendant that the plaintiff was walking across the road and not along the road;

(2) the question for determination by the learned President in this case was essentially one of fact. The finding of the trial court should not have been disturbed as there was no valid reason to show that the trial judge had not taken advantage of his having seen and heard the witnesses.

Cases referred to:

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.
(2) *Lim Soh Meng & Anor* v. *Krishnan* [1967] 1 M.L.J. 8.
(3) *Menah binti Sulong* v. *Lim Soo and Anor.* [F.C. Civil Appeal No. 36 of 1970] (unreported).
(4) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 91.
(5) *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail* [1981] 2 M.L.J. 10.
(6) *Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.
(7) *Yahaya bin Mohamed* v. *Chin Tuan Nam* [1975] 2 M.L.J. 117.
(8) *Chan Peng Fook* v. *Kan Pak Lee* [1974] 2 M.L.J. 197.

HIGH COURT.

Balachandra Mahesan for the appellant.
G. Rethinasamy for the respondent.

Cur. Adv. Vult.

Arulanandom J.: This was an appeal by the appellant/defendant from the decision of the President Sessions Court Penang wherein he awarded the plaintiff/respondent in Penang Sessions Court Civil Action No. 8(C) 370 of 1978 the sum of $5,600/– as general damages on the basis of 50% liability together with interest and $362/– as special damages for injuries sustained as a result of an accident on 19.7.77 in Bukit Tengah, Province Wellesley when she was knocked down by the Defendant/Appellant riding his motor cycle No. PW 3524.

The gravamen of the Appellant/Defendant's complaint was that the President had indulged in unwarranted speculation as to how the accident occurred and had not taken into serious consideration the pleadings and the evidence adduced in the case. The appellant claimed that the learned President was wrong in holding that the appellant/defendant was riding his motor-cycle without due care and attention and without reasonable consideration for other road users.

According to the Statement of Claim, the plaintiff/respondent was lawfully walking along the proper side of the road Permatang Batu, Bukit Tengah, Province Wellesley, when the defendant/appellant collided violently into her causing her severe bodily injuries.

According to the Statement of Defence, the accident was caused by the plaintiff/respondent crossing the said road from left to right as one faces Bukit Mertajam from Butteworth without first ascertaining that it was safe to do so.

At the trial itself, the plaintiff/respondent said in evidence "I was crossing the road from left side to right side before crossing. There were no vehicles on right and right before crossing. There were no vehicles on right and left. I was in the middle of the road near the white line when I crossed, I was knocked down."

Again in cross-examination she said "I honestly looked to left and right. I don't know how far. The road is a straight one. There was no vehicle. I could see ... I crossed the road when there was no traffic. Since there was no traffic on the road I could cross ... There was no vehicle when I crossed. I do not know from where the vehicle came." This was contrary to her pleadings and it is settled law that a plaintiff is bound by his pleadings but in view of my other findings in this case I do not think it is necessary to lay too much emphasis on technicalities.

Again contrary to her pleadings, in her police report the plaintiff/respondent admitted she was crossing the road.

This was the plaintiff's case. The only other piece of evidence was the sketch-plan to which I shall revert later.

The appellant/defendant's evidence which was not shaken in cross-examination was that he was riding his motor-cycle on the material date and time towards Bukit